Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 473

REBECCA REYHER,

Petitioner,

—v.—

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

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Respondents would have this Court believe that the decisions of the District Court and the Court of Appeals—directly and diametrically in conflict with one another—are congruent and consistent with one another and, accordingly, there is no issue for this Court to decide.

Say respondents:

> "The Court of Appeals affirmed the District Court's dismissal of petitioner's complaint *on the same grounds that supported the District Court's legal conclusion*" (Resp. Br. p. 1) (emphasis supplied).

Such a statement of respondents is untrue and at direct variance with what the Court of Appeals below said:

". . . we must overturn the trial court's factual finding that there were substantive similarities between the two works." (Pet. 5a).

Respondents assert that there was no reversal of the District Court on any fact issue by the Court of Appeals as alleged by petitioner. The District Court held, say respondents, that plaintiff's entire work—a children's story about a child's love for her mother—was in the public domain because it was a folk tale. Therefore, say respondents, any copying of the story line—the locale or anything else which the court held took place—was fair game and not copyright infringement.

The respondents then, in an act of legerdemain, say the Circuit Court did not disturb this ruling even though that court held that the work was not derivative or in the public domain because there was no other source but plaintiffs' copyrighted story in evidence. That court held there was no copyright infringement because there was no similiarity between the stories. Respondents concede the trial court found similarity and looked at a video tape of Sesame Street moppet theatre set in Russia just as was plaintiffs' story (footnote Resp. Br. p. 13). No matter, say respondents, the appellate court neglected to review this evidence and stated unequivocally and in error that respondents' second shortened version, a story set in Africa with the same plot, was the only version in evidence (Pet. 9a). The appellate court then looked to that change of locale to Africa as a pivotal reason for finding no similarity between the two works of plaintiffs and defendants (Pet. 9a).

If this Court permits this to stand, an appellate court is entitled to disregard, negligently or capriciously, the evidence and the ruling of the trial court in violation of Rule 52(a). It need not find the trial court's ruling

"clearly erroneous" as the rule requires because it may look or not look, as it chooses, at the documentary evidence and come to its own conclusion. Moreover, (and here the non-sequitur becomes worse)—it need not even look at the documentary evidence if it comes to the same overall conclusion of the trial court whether or not it reverses on the law or fact.

Responding to I (Resp. Br. pp. 4-8)

It is this conclusion urged by respondents which would obfuscate the thrust of petitioners' argument. It is clear from the long list of cases cited by petitioner that the Circuit Courts of Appeal are in conflict on the issue of their obligation under the law and F.R.C.P. 52(a) (Pet. p. 10). The issue raised by petitioner—that there is such a conflict in the Circuits—is not met by respondents at all.

Instead, respondents argue at length on the standards of review to be invoked by a reviewing court faced with making the determination of whether or not the trial court's finding of fact is clearly erroneous.

Respondents have failed to comprehend what Judge Frank discussed in *Orvis* v. *Higgins*, 180 F.2d 537 (2 Cir., 1950). There the court held the trial judge's fact finding "clearly erroneous" (180 F.2d at 540). The discussion which preceded the finding of "clearly erroneous" referred to the standards to be applied by an appellate court in deciding that issue and gave no authority to disregard the express language of Rule 52(a) which requires the finding of "clearly erroneous" by the appellate court before it may reverse the trial court. *Pan American World Airways, Inc.* v. *Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2 Cir. 1974), cited by respondents, is

> ". . . we must overturn the trial court's factual finding that there were substantive similarities between the two works." (Pet. 5a).

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of no help since the court there affirmed the District Court fact finding and rejected as a matter of law the contention urged by appellants that the trial court's fact finding was "clearly erroneous".

Respondents further have muddied the waters by the listing of eleven cases in a footnote on page 8 of its brief to support the proposition it urges that there is consistency on this issue among the Circuit Courts of Appeal. Instead, those cases support petitioner's contention that there is indeed confusion in the application of Rule 52(a) among the circuits, and that the issue is ripe for decision and clarification by this Court. Viz:

(a) Cases which say:

Findings of fact are reversible without a finding of "clearly erroneous" where the ultimate fact is based on inferences from undisputed facts.* *Soles* v. *Franzblau*, 352 F.2d 47 (3 Cir. 1965), *cert. den.*, 383 U.S. 911 (1966); *Ball* v. *Paramount Pictures, Inc., et al.*, 169 F.2d 317 (3 Cir. 1948); *Thomas* v. *Commissioner of Internal Revenue*, 254 F.2d 233 (5 Cir. 1958); *Securities and Exchange Commission* v. *Coffey*, 493 F.2d 1304, 1311 (6 Cir. 1974), *cert. den.*, 420 U.S. 669 (1936); *Fritz* v. *Jarecki*, 189 F.2d 445 (7 Cir. 1951).

(b) Cases which say:

Rule 52(a) always requires a finding of "clearly erroneous", but the showing of erroneous need not be as compelling if the evidence is mainly documentary; *Volks-*

* This is indeed a qualification of the rule, which restated, might be advanced as an appellate court's right to reverse on the law or on mixed questions of law and fact.

wagen of America, Inc. v. *Jahre*, 472 F.2d 557 (5 Cir. 1973); *Brinker-Johnson Company* v. *Barnes*, 272 F.2d 250 (9 Cir. 1959); *Mid-Continent Casualty Company* v. *Everett*, 340 F.2d 65, 70 (10 Cir. 1965).*

(c) A case which says:

The "clearly erroneous" rule does not apply to construction of written documents: *Teamsters Local Union No. 688* v. *Crown Cork & Seal Company, Inc.*, 488 F.2d 738 (8 Cir. 1973).

(d) Cases which say:

Rule 52(a) means that the Court of Appeals is bound by trial court findings even though based on documentary evidence, unless they are "clearly erroneous": *Nalle* v. *First National Bank of Baltimore*, 412 F.2d 881 (4 Cir. 1969); *Merrill Trust Company* v. *Bradford*, 507 F.2d 467 (1 Cir. 1974). Also see cases listed p. 10 of Petition.

Responding to II (pp. 9-14)

Respondents assert in contradiction to the opinions below that

> "The Court of Appeals sustained the District Court's legal conclusion on the same finding of fact which supported the District Court's dismissal of the complaint after a full trial on the merits; i.e. 'on the ground that any similarities between the two works related only to non-copyrightable matter'. See 533 F.2d at Page 90 and 38 F.Supp. at page 781."

* Test of "clearly erroneous" is there defined as whether "a mistake has been committed".

If we refer to the pages indicated we read that the District Court said:

> ". . . plaintiffs' book is a 'derivative' work. That is, it has been 'substantially copied from a prior work' in the public domain . . . Reyher's 'original intellectual product' . . . does not include the plot or sequence of events appearing therein . . . the defendants have done nothing more than make their own variation of the story Mrs. Reyher's mother had told her as a child . . . Thus defendants' use of a story line which is substantially similar to that appearing in plaintiffs' copyrighted book does not give rise to a cause of action under the copyright laws." (Pet. 15a-17a).

On the other hand, the Court of Appeals said:

> "Although we disagree with the district court's 'derivative work' rationale, we nevertheless affirm its dismissal of this case on the ground that any similarities between the two works related only to non-copyrightable matter. *In reading this conclusion we must overturn the trial court's factual finding that there were substantial similarities between the two works.* While we recognize that our appellate function usually does not include fact-finding, where as here, the determination of similarity rests solely on a comparison of the works in issue rather than on credibility of witnesses or other evidence only for the factfinder, 'we are in as good a position as the trial judge' to determine the issue." (Pet. 5a, 6a) (emphasis supplied).

Respondents simply have overlooked the clear words of the Court of Appeals that it was overturning the "factual finding that there were substantial similarities between the two works," when it stated that the Court of Appeals legal conclusion was based on the "same finding of fact".

Moreover, respondents really rely on the derivative—pubic-domain defense as controlling on the infringement claim—and they do so because the title plaintiffs' book bears is "My Mother is the Most Beautiful Woman in the World",* a folk tale retold by Becky Reyher.

Respondents by footnote attempt to bolster this point (Resp. Br. p. 10) by stating that petitioner is in error in claiming "there was no evidence adduced of any other such story as she told . . ." Moreover, respondents claim petitioner is estopped from claiming her work is in the public domain even though the court below (the Second Circuit) made no such finding. Even if there were a public domain source for plaintiffs' work (and there was no such evidence below) (Pet. 4a, 5a), that fact would not invalidate plaintiffs' copyright nor an action for infringement unless the alleged infringer could show that he consulted and relied on an independent source. *Italian Book Co.* v. *Rossi*, 27 F.2d 1014 (S.D.N.Y. 1928); *Hartfield* v. *Peterson*, 91 F.2d 998, 1000 (2 Cir., 1937); *Banks* v. *McDivitt*, 2 Fed. Cases 759, Case 961 (S.D.N.Y. 1875); *Toksvig* v. *Bruce Publishing Co.*, 181 F.2d 664, 667 (7 Cir. 1950); *Mills Music* v. *Cromwell Music*, 126 F.2d 54, 74 (S.D.N.Y., 1954); *Wihtol* v. *Wells*, 281 F.2d 550, 553, 554 (7 Cir. 1956).

Respondents unsuccessfully attempt to assert that there was no similarity in their infringing work even though Judge Cannella found

> ". . . the defendants have done nothing more than make their own variation of the story Mrs. Reyher's mother had told her as a child. There being no claim by Mrs. Reyher that her mother's story is copyrighted or that it is entitled to any form

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* Petitioner previously referred in error to the title as "The Most Beautiful Woman in the World". (Pet. p. 3).

> of protection, the defendants have the same right to make use of it as does Mrs. Reyher herself. Thus, defendants' use of a story line which is substantially similar to that appearing in plaintiffs' copyrighted book does not give rise to a cause of action under the copyright laws." (Pet. 17a).

It is sheer casuistry to say that the Second Circuit has not overturned the district court's fact finding, particularly when it expressly so stated (Pet. 5a).

It is important to all litigants in the federal court and elsewhere to be able to rely on the law that Congress passed (Rule 52a) and to expect the courts to follow and enforce the law. The effect of the two-court action in this case further deprives an original writer and copyright holder of her constitutional and statutory right to protect her property right in her copyright.

CONCLUSION

This court should grant the petition for certiorari.

Respectfully submitted,

November 12, 1976

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